IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J. D. STRONG, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-PJC**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY OF DEFENDANTS' WITNESS JAY CHURCHILL

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JOINT RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY OF DEFENDANTS' WITNESS JAY CHURCHILL

Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc. and Simmons Foods, Inc. hereby submit their joint Response to *Plaintiffs' Motion in Limine to Preclude Expert Testimony of Defendants' Witness Jay Churchill* (Dkt. #2058), requesting the Court to deny Plaintiffs' instant Motion in its entirety. In support of their Response, Defendants state as follows:

I. INTRODUCTION

Mr. Jay Churchill, who is employed by Conestoga-Rovers & Associates (CRA), is a seasoned expert in the collection of environmental samples and is likewise conversant with the various procedures, protocols, guidances and industry standards pertinent to such sampling. *See* Churchill Depo. at 50:16-24, 221:10, 45:15-22, attached hereto as Ex. A. The Court has previously heard and accepted Mr. Churchill's testimony during the hearing on Plaintiffs' Motion for Preliminary Injunction during which Mr. Churchill testified regarding the numerous technical errors and deficiencies in Plaintiffs' environmental sampling of several poultry farms during 2006 and 2007, which was conducted in furtherance of, *inter alia*, Plaintiffs' RCRA and CERCLA claims. The core of Mr. Churchill's opinions in this matter remain the aforementioned environmental sampling.

Mr. Churchill and CRA were retained by Defendants in this matter for purposes twofold: (1) "to review documents associated with the Illinois River Watershed (IRW) Sampling Activities, including but not limited to a work plan prepared by Camp Dresser and McKee (CDM) . . . ;" and (2) to provide "oversight of certain field sampling activities conducted by CDM personnel of contract growers' farms pursuant to subpoenas and notices in 2006 and 2007,

including a portion of CDM's soil, groundwater, surface/spring water, and poultry litter sample collection activities." Dkt. #2058-2 at 3; *see* P.I. Hrg. Tr. at 1025:1-3, attached hereto as Ex. B ("We were hired to review a work plan and standard operating procedures prepared by CDM and then to conduct field oversight of CDM's sampling activities").

More specifically, as described in his report and his prior testimony, Mr. Churchill reviewed, *inter alia*, the CDM standard operating procedures (SOP or SOPs); other references used by CDM; and protocol and guidance documents from the United States Environmental Protection Agency (USEPA or EPA), state agencies and other industry standards. *See* Dkt. #2058-2 at 43; P.I. Hrg. Tr. at 1025:1-3, 1028:9-11. Mr. Churchill and CRA then physically observed CDM's sampling activities in the field, using his education, training and experience to compare those sampling activities to the aforementioned standards. *See* P.I. Hrg. Tr. at 1025:1-3, 17-25, 1026:11-18. Based on this methodology, Mr. Churchill generally opines that (1) CDM's implementation of and adherence to "the SOPs do not produce repeatable procedures," *see* Dkt. #2058-2 at 43; (2) "CDM cannot defend that the samples of soil, groundwater, surface/spring water, and poultry litter collected by CDM are not cross-contaminated or otherwise representative of the targeted sample media," *id*. at 39; and (3) therefore, "personnel reviewing and making decisions based on the data generated from the IRW sampling program conducted by CDM have no assurance of the quality of the data collection procedures and quality of the data." *Id*. at 45.

In challenging his qualifications to render expert opinions on these topics, Plaintiffs' Motion ignores the extensive qualifications of Mr. Churchill to offer the opinions set forth in his prior testimony before the Court and in his November 2008 report in favor of tangential, cherry-picked testimony from his deposition, which purports to demonstrate that "he lacks necessary

qualifications to answer the 'specific' questions at issue." Dkt. #2058 at 1. Notwithstanding Plaintiffs' hyper-technical and selective criticisms of Mr. Churchill's qualifications, he is qualified to offer expert opinions on his observations of CDM's environmental sampling activities based on his education, training and professional experience. In this regard, Mr. Churchill "has a degree in engineering, and over 20 years of professional experience in engineering, project management, design, and construction oversight of environmental projects throughout North America and Puerto Rico." Dkt. #2058-2 at 4. His professional experience further "fits" with the opinions he has rendered in this matter regarding his analysis of CDM's environmental sampling, to wit:

> Mr. Churchill has collected numerous soil, sediment, surface water, groundwater, concrete core, wipe, sludge, and air samples in accordance with regulatory agency-approved work plans and guidances at numerous sites. Mr. Churchill additionally has technical expertise in the agricultural field related to conservation planning, agricultural waste management systems, land treatment practices, nutrient management, and soil and water quality. Mr. Churchill provides project management and technical expertise to CRA's Agricultural Services Group and has been instrumental in the preparation of detailed reports, Comprehensive Nutrient Management Plans, work plans for agri-environmental projects, completion of environmental assessments for agricultural operations, and design review.

Dkt. #2058-2 at 4-5. Mr. Churchill's testimony is further bolstered by his curriculum vitae (attached hereto as Ex. C), which was notably absent from the copy of Mr. Churchill's report attached to Plaintiffs' instant Motion. In any event, Plaintiffs do not contest these qualifications or otherwise question their applicability to Mr. Churchill's opinions in this matter.

Plaintiffs' attacks on Mr. Churchill's methodology are also without merit. Mr. Churchill's methodology, as referenced above and discussed in greater detail in Part II.C.1 and 2, *infra*, is an accepted method of evaluating sampling activities. *See* Churchill Depo. at 75:11—76:10, 180:23—182:9. "The reason USEPA and other agencies have promulgated SOPs and protocols

is to provide consistent methods for sample collection, thereby ensuring sample integrity and reliable analytical results." Dkt. #2058-2 at 6. Mr. Churchill and "CRA field personnel observed repeated and material violations of the aforementioned SOPs and protocols and industry standards during oversight of the CDM sampling activities." *Id.* Thus, as stated in Mr. Churchill's report, these deficiencies in the sampling program "impair[] the defensibility of the integrity of samples collected by CDM and the representativeness of the analytical results generated therefrom." *Id*. at 11. Indeed, Mr. Churchill opined that "most of the samples were compromised in some fashion and [were] not representative of what was there." P.I. Hrg. Tr. at 1055:15-17. Plaintiffs' disagreement with Mr. Churchill's criticism of their sampling program is simply an issue of the weight that should be given to his opinions, and not a matter of admissibility. *Cf. Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

In any event, Mr. Churchill is qualified to offer the expert opinions regarding Plaintiffs' sampling efforts and the numerous, documented deficiencies in those efforts. As such, Plaintiffs' instant Motion should be denied in its entirety.

II. ARGUMENT AND AUTHORITY

A. Mr. Churchill satisfies the requisite standards for admissibility of expert opinions

Before allowing the admission of expert opinions, the Court must determine pursuant to its gatekeeper role whether the expert witness possesses the requisite "knowledge, skill experience, training or education" to offer expert opinions relevant to the matter and whether those opinions are reliable under the general standards set forth in *Daubert* and *Kumho*. *See Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1120-21 (10th Cir. 2004); *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1231-32 (N.D. Okla. 2007); Fed. R. Evid. 702. No single factor is

dispositive of the admissibility of an expert's proposed testimony. *See Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).

Rather, in considering the reliability of an expert's opinions, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *see United States v. Nacchio*, 555 F.3d 1234, 1245 (10th Cir. 2009). Similarly, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in LeFlore Co., Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996); *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, (1993) (noting that "[v]igorous cross-examination" remains an appropriate means of attacking admissible evidence).

Plaintiffs attack Mr. Churchill's opinions under both prongs of the *Daubert*/*Kumho* analysis. First, Plaintiffs contend that Mr. Churchill is not qualified to offer opinions on the observed and documented inadequacy of Plaintiffs' sampling regimen, based on his purported lack of experience with environmental sampling. Second, Plaintiffs contend that, if the Court finds Mr. Churchill's qualifications sufficient for the task for which he was retained, his opinions are nonetheless unreliable because he purportedly did not employ any clear methodology to arrive at his opinions in this case. As discussed below, neither of Plaintiffs' contentions has merit in either law or fact. Accordingly, Plaintiffs' instant Motion should be denied in its entirety.

B. Mr. Churchill is qualified to render expert opinions in this case

Despite Plaintiffs' contentions otherwise, Mr. Churchill's qualifications to render the opinions he has offered in this matter are impeccable and, without question, are sufficient to qualify him as an expert on the deficiencies in Plaintiffs' environmental sampling regimen. Of particular note, apart from a passing reference that Mr. Churchill is a professional engineer,

Plaintiffs do not discuss (or otherwise question the sufficiency of) Mr. Churchill's education, training and experience. Indeed, as noted, Plaintiffs omitted Mr. Churchill's curriculum vitae from his report, which highlights, among other things, his education, training, and twenty (20) years of professional work experiences in environmental and agricultural engineering. *See* Ex. C. Instead of addressing Mr. Churchill's actual qualifications and expertise, Plaintiffs make a disingenuous straw-man argument that Mr. Churchill's qualifications do not fit their tortured re-characterization of their sampling program.

In furtherance of this effort, Plaintiffs base their meritless attack on Mr. Churchill's qualifications on the inapplicable opinion of *In re Williams Securities Litigation*, 496 F. Supp. 2d 1195 (N.D. Okla. 2007), in which the Court found that an expert did not have sufficient knowledge of technical telecom matters significantly differing from his underlying expertise in business and finance. *See id*. at 1232; *but* c*f. Farmland Mut. Ins. Co. v. Chief Indus., Inc.*, 170 P.3d 832, 837 (Colo. Ct. App. 2007) (holding that "[a]n expert need not have worked in the industry in question to provide an expert opinion, so long as he or she is familiar with industry standards"). The *Williams* case contains an extensive *Daubert* discussion; but especially with regard to the qualification portion of the analysis, the opinion simply is not analogous to the circumstances in this case.

Foremost, the *Williams* opinion addressed "some unusually specific and discrete matters," which are simply not present with regard to Mr. Churchill's opinions on Plaintiffs' general disregard for standards governing environmental sampling. *Id*. It was in this former context that the *Williams* opinion undertook its "specific question" analysis on which Plaintiffs rely to seek exclusion of Mr. Churchill's expert opinions. The "specific question" involved in *Williams* was whether an investment banker was qualified to offer expert opinions on the alleged

impairment of telecommunications fiber network and equipment under FAS 121, an applicable financial accounting standard. *See id.* at 1237-38. In other words, the Court was called upon to determine whether these specific and discrete opinions were within the "reasonable confines" of the investment banker's qualifications and expertise. *See id*. at 1244.

In analyzing the issue, the *Williams* Court found that "[t]he determination of the existence of impairment loss under FAS 121 . . . plainly required . . . several separately identifiable analyses and judgments." *Id*. at 1238. The *Williams* Court summarized these "several separately identifiable analyses" as follows:

> Mr. Mathis's FAS 121 Step 2 and 3 analysis plainly required, on the basis of understanding, of the then-relatively new (but rapidly expanding) fiber optic data transmission business (augmented by an understanding of competing data transmission technologies): judgments as to classification and grouping of fiber optic assets and related equipment assets (with related judgments as to the present and future physical and commercial interrelationship between lit and dark fiber assets), judgments (on a retrospective as well as prospective basis) as to the extent and effect of increases in industry-wide capacity, judgments as to future retention core fiber and associated assets (with related judgments as to the impact of existing and foreseeable technology improvements on capacity), judgments as to present and future domestic and international demand for internet, data, voice and video data transmission services and for rights of use of dark fiber, judgments as to the affect of market and technology factors on prices for data transmission services (and rights of use), as well as the costs of providing those services, judgments as to the remaining physical and technological useful life of the dark fiber assets, and judgments as to the appropriate discount rates, as affected by both micro- and macro economic factors.

Id. at 1242-43. However, the Court found that the expert, who was an investment banker with an MBA from a prestigious school and extensive business experience, did not possess the telecom-specific qualifications to opine on the aforementioned issues; *inter alia*, he was not a telecom expert; he had not consulted a telecom expert, who was employed by his firm; and he had never worked on behalf of a company which had a fiber network like the one at issue in the *Williams* case. *See id.* at 1243-44.

Consequently, the opinions offered by the expert on the alleged impairment of telecommunications fiber network were not within the "reasonable confines" of his expertise, *see id*. at 1244 (citing *Ralston v. Smith &Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001)), and they were, thus, excluded under the *Daubert* qualifications prong. Of note, however, were the expert in *Williams,* or any other expert for that matter, to offer opinions within the "reasonable confines" of their respective expertise, the purported absence of specialized qualifications goes to the weight afforded the opinions and not their admissibility. *See id*. at 1232; *Ralston*, 275 F.3d at 970.

In the instant case, the opinions offered by Mr. Churchill fall well within the "reasonable confines" of his expertise, thus satisfying the qualifications prong of the *Daubert* inquiry. Moreover, the purported deficiencies in Mr. Churchill's "specific" qualifications do not exist in the first instance and, for sake of argument, if they did, they do not rise to the level present in the *Williams* litigation. Plaintiffs criticize Mr. Churchill's qualifications because, in their opinion, he does not have the specific qualifications to "answer the 'specific question' here of whether the State's field investigation in this case produced reliable and representative data." Dkt. #2058 at 9. However, Plaintiffs have not identified any "unusually specific and discrete matters" attendant to their field investigation or environmental sampling program, which might render the *Williams* analysis applicable to Mr. Churchill's opinions. At best, their criticisms go to the weight of Mr. Churchill's opinions and not their admissibility.

For example, Plaintiffs find fault with Mr. Churchill's qualifications because he has not "drafted an SOP." Dkt. #2058-2 at 2. However, Mr. Churchill has drafted and implemented "sampling analysis plan[s]," which—as explained by Mr. Churchill—is for all intents and purposes the same as an SOP. *See* Churchill Depo. at 25:24—28:9, 38:24—39:12; P.I. Hrg. Tr.

at 1023:13—1024:21.[1] Plaintiffs further find fault with Mr. Churchill's qualification because he has not, or so they claim, conducted environmental sampling concerning non-point source runoff. *See* Dkt. #2058-2 at 2. However, Mr. Churchill's answer to the question cited by Plaintiffs in support of this proposition was corrected from "no" to "yes" in the subsequent errata to Mr. Churchill's deposition. *See* Corrections to Depo. of Jay Churchill, Page 31, Line 25, attached hereto as Ex. D. Moreover, Plaintiffs contend that Mr. Churchill has not conducted soil sampling for purpose of investigating nutrients. Plaintiffs omit the fact that Mr. Churchill has conducted nutrient sampling related to development of comprehensive nutrient management plans, *see* Churchill Depo. at 28:13—29:10, and has conducted soil sampling. *See id*. at 38:24—39:12, 41:12-21. In each of these instances, Plaintiffs' criticisms amount to little more than hypercritical word play, lacking in both substance and foundation.[2]

Furthermore, in addition to the qualifications quoted in the Introduction, contained in his curriculum vitae and otherwise cited herein, Mr. Churchill further testified regarding his qualifications to render opinions on the environmental sampling topics for which he was retained in this matter, to wit:

> Q Is it necessary that you have personally collected poultry litter samples in order to be qualified to render opinions you've offered in this case?

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[1] Plaintiffs play these games of semantics throughout their Motion, criticizing Mr. Churchill's qualifications or the reliability of his opinions simply because the terminology used by him, such as "sampling analysis plan," does not fit their purpose for this *Daubert* challenge. However, of note, Plaintiffs' expert has used similar language referring to the SOPs, referring to them as "soil and litter sampling programs" and "work plans and sampling plans." Dkt. #2058-7 at 2. In any event, whether referred to as SOP, sampling analysis plan or work plan, the purpose of such an instrument is to provide repeatable directives for obtaining environmental samples.

[2] Plaintiffs also criticize Mr. Churchill's qualifications because he has not conducted an environmental investigation in this case. *See* Dkt. #2058 at 2. However, this criticism is a red herring. Mr. Churchill and CRA were retained to observe and evaluate only that sampling done pursuant to subpoenas issued by Plaintiffs in 2006 and 2007 to various poultry farmers in the IRW. *See* P.I. Hrg. Tr. at 1025:4-16.

A No.

Q Why not?

A *Well, the collection of environmental samples, I mean, the same – many of the same principles apply right across the board, whether it be, you know, the principles associated with, you know, properly compositing, using precleaned or decontaminated sampling equipment. It doesn't matter. I mean, many of the principles apply regardless of the medium you are sampling.*

Q In your career have you been trained in the sampling of a range of different substances?

A Yes, yes.

Q Do you have experience sampling a range of substances?

A Yes, quite a range of substances. The ones that immediately come to mind would be soil, groundwater, surface water, sludge, air samples, many different medium.

Churchill Depo. at 220:13—221:10 (emphasis added); *see also id*. at 8:14—9:4, 30:17—31:9, 36:17—37:21, 75:11—76:10, 112:10-24. In other words, Plaintiffs' environmental sampling program in this case does not implicate any "unusually specific and discrete matters" beyond Mr. Churchill's knowledge, skill experience, training or education. *See* Fed. R. Evid. 702.

In summary, for purposes of their attack on Mr. Churchill's qualifications, Plaintiffs propose that the question to be answered by him is focused on their "field investigation" and sampling plan. Nothing about that field investigation requires opinions on "unusually specific and discrete matters" like those present in the *Williams* opinion. Instead, the deficiencies in Plaintiffs' field investigation require the expert, technical opinions of someone, like Mr. Churchill, with several years experience in environmental and agricultural engineering and sampling, *see* Ex. C, and knowledge of the agency and industry standards applicable to such sampling. *See* Churchill Depo. at 45:15-22, 50:16-24, 221:10.

As such, the opinions offered by Mr. Churchill on Plaintiffs' sampling program fall within the "reasonable confines" of his expertise, based on his education, knowledge and experience. Accordingly, Plaintiffs' Motion should be denied, since Mr. Churchill is more than sufficiently qualified to offer opinions contained in his report and prior testimony.

C. Mr. Churchill's opinions in this case are reliable

Plaintiffs also attack the reliability of Mr. Churchill's opinions under *Daubert*. However, while criticizing the reliability of Mr. Churchill's opinions, Plaintiffs effectively concede that their criticism of Mr. Churchill's opinions regarding the deficiencies of their sampling program is simply a battle of experts on a technical issue, which is relevant to their claims in this lawsuit. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993); *In re Williams Securities Litigation*, 496 F. Supp. 2d 1195, 1233 (N.D. Okla. 2007) (noting that "*Daubert* scrutiny is neither a substitute for jury resolution of contested issues fairly presented by conflicting testimony from qualified experts nor a grant of uncabined discretion to district judges to reject expert testimony that rubs them the wrong way"); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) (noting "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance").

For example, on pages 3 and 4 of their Motion, Plaintiffs' exclaim that they "strongly dispute[] the factual allegations made by Mr. Churchill, and at trial, will present evidence demonstrating that CDM's sampling program was sound and compliant with all applicable standards." Dkt. #2058 at 3-4. However, "factual allegations," *i.e.*, expert opinions, regarding whether this environmental sampling program complied with applicable agency and industry standards necessarily requires the technical and specialized knowledge of an expert witness, such as Mr. Churchill and whomever Plaintiffs may offer on these topics. *See, e.g., Trail v. Civil*

Engineers Corps, 849 F. Supp. 766, 768 (W.D. Wash 1994); *Payne v. Geico Indem. Co.*, 2002 WL 34439222, at *1 (W.D. Okla. May 17, 2002).

In addition, in their Motion, Plaintiffs engage in a rote application of the *Daubert* factors to suggest that Mr. Churchill's opinions are not "scientific" because his opinions have not been peer reviewed and he does not calculate an "error rate" for the observations of Plaintiffs' poorly planned and executed sampling program. *See* Dkt. #2058 at 10. However, these *Daubert* factors do not apply to the technical opinions offered by Mr. Churchill. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42, 148-150 (1999). Indeed, the *Kumho* Court recognized that opinions of engineers, such as Mr. Churchill, may be measured based on personal knowledge and/or experience. *See id*. at 150 (noting that "the relevant reliability concerns may focus upon personal knowledge or experience"). Thus, the qualifications discussion, *supra*, in Part II.B also demonstrates that Mr. Churchill's opinions in this matter are reliable.

In any event, in an attempt to discredit the reliability of Mr. Churchill's opinions in this matter, Plaintiffs misstate or misunderstand the substance of his opinions and then attack the opinions that Mr. Churchill did not offer in his report and will not offer at trial. In this regard, for purposes of the reliability analysis, Plaintiffs criticize Mr. Churchill's putative opinions regarding their "sampling data and results," claiming that he did not employ a "reliable methodology" to analyze the data obtained from their sampling program. As discussed below, Plaintiffs' argument misses the mark on both the sampling data issue and the methodology issue.

1. Analysis of sampling data was not required to render opinions on the deficient sampling program

Plaintiffs are correct that Mr. Churchill did not analyze their sampling data; however, this contention is yet another straw-man argument. Without question, Plaintiffs—and not Mr. Churchill—have the burden to prove the reliability of their expert testimony and the data

collection procedures on which the testimony is based. *Cf. Oklahoma* ex rel. *Edmondson v. Tyson Foods, Inc.*, __ F.3d __, 2009 WL 1313216, at *7 (10th Cir. May 13, 2009) ("[A]ny step that renders the analysis unreliable renders the expert's testimony unreliable."). Accordingly, Mr. Churchill was not retained to analyze Plaintiffs' data, and such analysis was not necessary for him to render his opinions in this matter. Instead, Mr. Churchill's opinion is, "Based on CRA's observations CDM cannot defend that the representative samples collected was not compromised due to, in part, improper sample collection procedures and improper sampling equipment decontamination procedures. Accordingly, CDM also cannot defend that the resultant analytical data are representative." Dkt. 2058-2 at 33. In other words, Plaintiffs cannot defend the reliability of their data, *as is their burden*, because the sampling efforts conducted by Plaintiffs did not comport with their SOPs, industry standards or other potentially applicable protocols and procedures.

Compliance with industry standards, EPA guidance documents, SOPs or other consistent, objective protocols is essential "in order to obtain accurate, representative data." Dkt. #2058-2 at 21. Thus, the process by which samples are taken is an integral part of the measure by which the reliability of data is gauged. If the sampling process is not in accordance with the applicable standards, procedures and protocols, then the defensibility and integrity of the data is impaired, and it necessarily follows that the representativeness of the analytical results drawn from the data is likewise suspect. *See* Dkt. #2058-2 at 17. Notwithstanding Plaintiffs' attempt to do so, "it simply is not consistent with USEPA guidance or industry standards to conduct careless data collection practices then attempt to rationalize those practices as being satisfactory after-the-fact." Dkt. #2058-2 at 19.

As discussed by Mr. Churchill, a proper sampling program, which complies with well-established EPA guidances and industry standards, requires a number of protocols and controls which were absent from Plaintiffs' sampling program. *See* Dkt. #2058-2 at 43-45. Foremost, the SOP or sampling analysis plan should be written in such a way that the plan fosters repeatable, consistent procedures, "ensuring sample integrity and reliable analytical results." *Id*. at 6; *see id*. at 43. However, Plaintiffs' SOP failed to provide this control and, instead, became a *post hoc* justification for poor sampling practices, which underwent numerous revisions throughout the 2006 and 2007 sampling activities. *See* Dkt. #2058-2 at 8-10; *cf. id*. at 8-9 ("In fact, a SOP is a directive that establishes methods and procedures to be followed when completing certain activities, including but not limited to field sampling activities. . . . They document the way activities are to be performed to facilitate consistent conformance to technical and quality system requirements . . . .").

In addition, a proper sampling program also requires a "carefully prepared Quality Assurance Project Plan (QAPP)[;] however[,] CDM did not prepare or follow a QAPP to support the reliability of data generated from this program." Dkt. #2058-2 at 45; *see id*. at 14 (describing QAPPs required by Oklahoma environmental agencies). Moreover, the personnel performing environmental sampling should be properly trained. *See id.* at 44. However, with regard to Plaintiffs' sampling program, "it could not be confirmed whether each sampling team member had even been provided with a copy of the SOP for the sampling work they were going to conduct. . . . [And] no procedure was in place to re-train members when a SOP changed." *Id.* Mr. Churchill opines of the sampling team's training: "Quite frankly, they appeared to be rookies." *See* P.I. Hrg. Tr. at 1055:5-7. Of note, Plaintiffs do not attack Mr. Churchill's opinions regarding the necessity of a QAPP and adequately trained personnel.

Furthermore, a comprehensive environmental sampling program of multiple media, like the one Plaintiffs undertook in this case, requires safeguards against cross-contamination. *See* Dkt. #2058-2 at 44. Indeed, the EPA recognizes the importance of proper de-contamination to guard against cross-contamination. *See id.* at 29. Nonetheless, the cross-contamination issues in Plaintiffs' sampling program are myriad: Mr. Churchill and CRA documented cross-contamination of (1) discrete soil sample depth intervals, including cow manure included in samples, *see* P.I. Hrg. Tr. at 1031:4—1046:25;[3] (2) litter sampling, *see id*. at 1050:13—1053:20; (3) spring sampling, *see id*. at 1047:1—1048:22; and (4) well/groundwater sampling, *see id*. at 1048:23—1050:12. Of note, to the extent that Plaintiffs attempt to defend this cross-contamination, those efforts are limited to only the soil sampling, and those efforts are insufficient to justify the cross-contamination of soil samples. *Compare* Dkt. #2058 at 4-5, *with* Dkt. #2058-2 at 44.

With regard to defense of the cross-contamination of soil, Plaintiffs' sampling program and their experts "completely ignore[] some of the most significant contributors of cross-contamination between soil sample depth intervals." *Id*. at 44; *see* Churchill Depo. at 122:18—123:20, 146:22—148:17, 158:23—159:15. With regard to the discrete soil sample depths, Mr. Churchill explained:

> The way the samples were collected, dragging material. I mean, the sample zero to two, two to four, four to six-inch depth intervals were not truly representative of what they are trying to say they are. . . . I observed soil sample collection, and I observed that material from the four to six-inch layer was pulled into the sample for the two to four-inch layer, and I observed that material from the two to four-inch layer was pulled into the sample from the zero to two-inch layer. . . . [Y]ou don't need to do an analysis when you can see soil from one depth interval being included in a sample that they're purporting is being representative of a different depth.

[3] The Court likely recalls that, upon its inquiry, Mr. Churchill explained the problems created by Plaintiffs' cross-contamination of the discrete soil sample depths. *See* P.I. Hrg. Tr. at 1032:146—1034:7.

Churchill Depo. at 147:21-25, 148:2-7, 11-15; *see id*. at 180:23—182:9; P.I. Hrg. Tr. at 1034:22—1036:25.

With regard to cow manure contamination, Plaintiffs defend their sampling efforts because the lab purportedly removed all foreign debris from soil samples at the lab, *see* Dkt. #2058 at 5-6 (quoting from deposition of Darren Brown), and "the CDM soil preparation laboratory did not observe any instances of recognizable cow manure in the soil samples." Dkt. #2058-7 at 7. However, Plaintiffs ignore the fact that Mr. Churchill and CRA observed that certain soil samples contained cow manure. *See* P.I. Hrg. Tr. at 1027:3—1028:3, 1034:8—1046:20; Selected Photos from P.I. Ex. 50, attached hereto as Ex. E; Churchill Depo. at 107:22—108:6, 119:2—120:25, 138:16—139:12, 191:15—192:24. Thus, Plaintiffs effectively concede that their soil samples were contaminated by cow manure.

Plaintiffs further contend that these cross-contamination issues can be ignored because they composited the samples to minimize the otherwise conceded contamination of the samples and mistakenly claim that Mr. Churchill did not take this compositing process into account in his opinions. However, the concept that compositing contaminated samples eliminates the contamination is a *non sequitur*: Simply compositing a number of contaminated samples does not eliminate the contamination. Instead, as Mr. Churchill has opined, the compositing process exacerbates the contamination issue by impacting and impairing uncontaminated samples. *See* Churchill Depo. at 119:2—120:25; *see also* Dkt. #2058-2 at 37-38 (describing further problems with cross-contaminated samples). On a related note, the compositing of samples, as performed by Plaintiffs, also resulted in unrepresentative samples of poultry litter. *See* Churchill Depo. at 200:22—203:19; P.I. Hrg. Tr. at 1050:13—1052:25. Moreover, contrary to their position in the instant Motion, Plaintiffs' counsel previously acknowledged that, composited samples or not,

analyzing data "***wouldn't give you any indication of a sampling problem***." P.I. Hrg. Tr. at 1060:19-23 (emphasis added); *accord* Dkt. #2058-2 at 45 ("personnel reviewing and making decisions based on the data generated from the IRW sampling program conducted by CDM have no assurance of the quality of the data collection procedures and quality of the data").

As such, besides being ineffective, Plaintiffs' defense of their soil data based on their experts' analysis of the data and their criticism that Mr. Churchill did not analyze the data from the careless, inconsistent sampling practices places the cart before the horse. Mr. Churchill demonstrates this point in his report, in the context of the deficient well/groundwater sampling, to wit:

> On July 11, 2006[,] CDM collected water samples from the well at 2-Saun Farm. The samples were collected directly from a garden hose, a potential source of bacteria and other constituents. Based on CRA's review of CDM's field book for the well sampling, CDM did not even make note that the samples were collected from a garden hose. Also, there is no mention in CDM's field notes that the landowner would not allow access to the well water other than through the garden hose as CDM claims in Exhibit 13 to Mr. Brown's August 26 2008 deposition testimony. Personnel reviewing and making decisions based on the data from the water samples would have no way of knowing that the water samples were comprised and that the potential unrepresentativeness of the results should be properly considered in decision making.

Dkt. #2058-2 at 23. Mr. Churchill's report and prior testimony contain numerous, additional examples similar to the "2-Saun Farm" example for all sample media within the scope of the environmental sampling oversight project. *See, e.g.*, *id*. at 24.

Consequently, the fact that Mr. Churchill did not analyze the data obtained from Plaintiffs' poorly executed sampling program is irrelevant to his criticisms of the sampling program or the ultimate reliability of his opinions. As Plaintiffs conceded in February 2008, *see* P.I. Hrg. Tr. at 1060:19-23, analysis of the data will not provide any indication of a poorly executed sampling program. *See also* Churchill Depo. at 107:22—108:6.

2. The methodology underlying Mr. Churchill's opinions is reliable

Finally, Plaintiffs' "methodology" contention also lacks merit and, like their other contentions, amounts to a question regarding the weight that should be afforded by the jury to competing expert opinions. Plaintiffs' criticism of Mr. Churchill's methodology, which has been discussed at length above, is based exclusively on Mr. Churchill's reliance on applicable regulatory and industry standards, some of which are unwritten. As further discussed above, any attempt to justify the adequacy of the sampling program to gather representative data by analyzing data collected through a sampling program at issue is an exercise in futility and defies both logic and the various applicable standards and protocols developed by the EPA, state agencies and private industry organizations.[4]

Nevertheless, in attacking Mr. Churchill's methodology, Plaintiffs ignore these various *documented* standards that are cited and discussed throughout Mr. Churchill's report and, instead, focus on isolated opinions, which are—to Plaintiffs' chagrin—governed by unwritten

[4] The various agency and industry standards reviewed and considered by Mr. Churchill are set forth on pages 44 and 45 of his report, *see* Dkt. #2058-2 at 46-47, and include, among others, the following: (*1*) Guidance for Preparing Standard Operating Procedures (SOPs), EPA QA/G-6, EPA/600/B-07/001, April 2007, prepared by EPA; (*2*) Compendium of Superfund Field Operations Methods, EPA/540/P-87/001, December 1987, prepared by EPA; (*3*) ASTM D 5088-90, Standard Practice for Decontamination of Field Equipment Used at Nonradioactive Waste Sites, American Society for Testing and Materials; (*4*) USEPA Environmental Response Team, Standard Operating Procedures, Soil Sampling, February 18, 2000, prepared by EPA; (*5*) Compendium of ERT Groundwater Sampling Procedures, EPA/540/P-91/007, January 1999, prepared by EPA; (*6*) New Jersey Department of Environmental Protection, Field Sampling Procedures Manual, August 2005; (*7*) Environmental Investigations, Standard Operating Procedures and Quality Assurance Manual, November 2001, prepared by EPA; (*8*) Data Validation and Data Usability, August 1992, prepared by EPA; (*9*) Handbook for Sampling and Sample Preservation of Water and Wastewater, EPA-600/4-82-029, prepared by EPA; (*10*) Sampling Animal Manure, F-2248, Oklahoma Cooperative Extension; (*11*) Oklahoma Total Maximum Daily Load (TMDL) Practitioners Guide, prepared by Oklahoma Department of Environmental Quality; and (*12*) Quality Assurance Project Plan, Oklahoma Water Watch Volunteer Water Quality Monitoring Program, March 2006, prepared by Oklahoma Water Resources Board. *See also* Dkt. #2058-2 at 20-21.

industry standards. For instance, the single example addressed in Plaintiffs' Motion that Mr. Churchill's opinions are not based on any ascertainable standards is Plaintiffs' failure to remove manufacturer and store labels from shovels used in their sampling program. *See* Dkt. #2058 at 11. Mr. Churchill explained the basis of these types of standard practices, to wit:

> Q On the issue of industry standards for the environmental industry, are there standards that you're aware of that exist in the industry from sources other than printed guidelines from the EPA or some other state agency?
>
> A I mean, there are commonly accepted standards that might not necessarily be written down.
>
> Q Is there a written standard somewhere that says do not put your ungloved finger in a sample bag?
>
> . . . .
>
> A No, no. The standards that are applicable don't lay everything that you absolutely shouldn't do that are, you know, *just common sense for people*, you know, *in the environmental business know not to conduct certain activities*.

Churchill Depo. at 221:11—222:2 (emphasis added).

Certainly, Plaintiffs' shovel example falls within the scope of industry standards described by Mr. Churchill in the above quote. Indeed, Mr. Churchill explained why unwritten industry standards dictate that Plaintiffs should have removed the labels from the shovel and decontaminated it prior to using it in their sampling, to wit:

> You should make sure you're using clean equipment, and one way of making sure you're using clean equipment would be to decontaminate it prior to use.
>
> . . . .
>
> It's – I would say it is pretty common knowledge in the industry to use clean equipment prior to initiating a sampling program. You know, you might not find an EPA guidance that specifically states that you must decon equipment prior to a single use.
>
> . . . .
>
> Just because it's not – it may not be written down doesn't mean it's not the norm and not appropriate.
>
> . . . .
>
> I mean, if they were to get, you know, a shovel from the local co-op – I don't know if they got – who knows if that shovel was sitting next to fertilizer bags that are for public use. Who knows? You know, we've all seen, you know, bags of

> fertilizer leaking at the co-op with rips in them and things like that. So that's why it's appropriate to make sure that you have – that you know what you are starting your sampling with.

Churchill Depo. at 162:20-23, 163:2-7, 9-10, 164:21—165:4. In response to Mr. Churchill's opinion on the shovel labels, Plaintiffs justify leaving the label on the shovel "to demonstrate that the shovel had not been used at any other location and to limit the exposure of litter to any label adhesive that can be difficult to remove at times." Dkt. #2058 at 12 n.3. Notably, Plaintiffs do not cite any industry standard—whether written or unwritten—that endorses either of these fanciful reasons for leaving manufacturer or store labels on a sampling instrument.

That certain industry standards have their bases in good practice and common sense, and are not written down, does not detract from, or even begin to raise doubts about, the reliability of Mr. Churchill's opinions which are based on (1) certain unwritten industry standards; (2) the standards cited and discussed in his report, *see, e.g.*, *supra* n.4; and (3) his education, knowledge and experience. As such, Plaintiffs have failed to demonstrate that Mr. Churchill's opinions are anything but reliable expert opinions which will assist the trier of fact to understand the evidence and issues that will be presented at trial of this lawsuit.

III. CONCLUSION

In conclusion, Mr. Churchill's qualification and the reliability and ultimate admissibility of Mr. Churchill's testimony has previously been determined and accepted by the Court in this case. Nonetheless, Mr. Churchill is qualified to offer the opinions in his expert report and his prior testimony based on his education, knowledge and experience in the field of environmental and agricultural engineering. As demonstrated, Plaintiffs' reliance on the "specific qualifications" analysis in the *Williams* opinion is misplaced and inapposite to the instant Motion. Moreover, that Mr. Churchill is qualified to offer the opinions in his report also speaks

to the reliability of those opinions under the standards set forth in *Kumho*. In any event, Plaintiffs' criticisms of the reliability of his opinions are without merit: Mr. Churchill's opinions, which are based on Plaintiffs' failure to comply with applicable EPA, state agency and industry standards whether written or nor, do not require him to analyze the data obtained from Plaintiffs' inadequate and poorly executed sampling program. As such, Defendants request the Court to deny *Plaintiffs' Motion in Limine to Preclude Expert Testimony of Defendants' Witness Jay Churchill* (Dkt. #2058) in its entirety.

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